SAMBU PERNAS CONSTRUCTION & ANOR.

v.

PITCHAKKARAN KRISHNAN

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[FC APPEAL NO. 37 OF 1978]
12 & 30 JANUARY 1982

DAMAGES: *Fatal accident - Employment - Suit against employer barred by s. 31 of Employees' Social Security Act - Whether dependant's position must be the same as deceased's position - Whether dependant may sue co-employee.*

DAMAGES: *Personal injury - Employment - Whether insured person cannot sue employer - Whether insured person may sue third party such as co-employee - Employees' Social Security Act 1969, ss. 31, 42.*

DAMAGES: *Fatal accident - Employment - Whether widower is a dependant within Employees' Social Security Act 1969 - Whether widower subject to restriction in ss. 31 & 42 of the said Act.*

DAMAGES: *Fatal accident - Conditions necessary to succeed under s. 7 Civil Law Act 1956.*

The respondent's wife was knocked down by her co-worker in an accident that occurred at her employer's work site. As a result of the injuries sustained, she died and thus the respondent sued the employer (the first appellant) and the co-worker (the second appellant) claiming damages under ss. 7 and 8 of the Civil Law Act 1956 for the benefit of himself and the children of the deceased on account of loss and damages suffered by them as a result of the deceased's death. The appellants denied liability but the trial Judge held that they were liable and consequently, he made an order in favour of the respondent. Dissatisfied with the decision, the appellants appealed against the same.

As the deceased had been insured by the first appellant under the Employees' Social Security Act 1969, the appellants questioned, and this was the sole issue, whether s. 31 of the Employees' Social Security Act 1969 applies to bar the respondent from suing the appellants. The respondent's contention in response to this was that s. 31 does not apply to a widower.

Held:

[1] In *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn, Bhd.*, the Federal Court held that ss. 31 and 42 of the Act bars an insured person from suing his employer in respect of an employment injury suffered by him. And in *Tan Peng Loh v. Lee Aik Fong & Anor*, it was further held by the Federal Court that although an insured person cannot sue his employer for damages in respect of employment injury, s. 31 does not prevent him from suing a third party, such as his co-employee, whose negligence has caused injury to him.

[2] Although a widower is not a dependant within the meaning of the Employees' Social Security Act and therefore *prima facie* not subject to s.31, and s. 42, the case must be looked at from the point of view of the widower's title to institute the suit.

[3a] It is clear from the wordings in s. 7 that two conditions must be satisfied before a person can successfully maintain the suit. The first is that he has to prove that the death of the deceased was caused by "wrongful act, neglect or default" of the party against whom the present claim is made.

[3b] The second condition is that it must be shown that the default by the party against whom the present claim is made is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect of the injuries inflicted. The test that ought to be applied in respect of this condition is this : Would the deceased have been entitled to recover damages if he had not died and had sued the party against whom the present claim is made.

[4] Applying the test to the present case, had the deceased been alive and sued the appellants in respect of the injuries caused to her in this accident, she would have been barred from suing the first appellant because of s. 31 of the Employees' Social Security Act but she would not have been barred from suing her co-employee i.e. the second appellant. Consequently, the respondent's position cannot be better or worse than of the deceased herself. It must be the same. Whatever defence that would have been available to the appellants against the deceased, if the deceased had survived and sued, would equally be available against the respondent. The respondent acting under s. 7 of the Civil Law Act could not have a greater right of action than what the deceased herself had and since s. 31 of the Employees' Social Security Act would have been applicable against the deceased, if she had survived and sued, it is therefore equally applicable against the respondents.

[Appeal by first appellant allowed; appeal by second appellant dismissed; costs in lower Court and this Court to be borne by second appellant.]

Cases referred to:
Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd. [1982] 1 MLJ 80
Tan Peng Loh v. Lee Aik Fong & Anor. [1981] CLJ (Rep) 96
Baker v. Bolton [1808] 1 Camp 493
Read v. Great Eastern Rly. Co. [1868] 3 LR QB 555
Haigh & Ors. v. The Royal Mail Steam Packet [1888] 52 LJ QB NS 640
Williams v. Mersey Docks and Harbour Board [1905] 1 KB 804
British Electric Rly. Co. v. Gentile [1914] AC 1034

Legislation referred to:
Civil Law Act 1956, ss. 7, (1), 8
Employees' Social Security Act 1969, ss. 31, 42
Fatal Accident Acts 1846 - 1959 [UK], s. 1

For the appellants - Zainuddin Ismail; M/s Tunku Zuhri, Manan & Abdullah
For the respondent - G. Sri Ram; M/s Chan & Chia

JUDGMENT

Salleh Abas FJ:

The respondent is a widower whose wife named Lakshmi Kanta a/p Krishnanswarni (hereinafter referred to as "the deceased") died on 26 January 1975. The deceased was employed by the first appellant whilst the second appellant was her co-worker employed by the same employer, first appellant. At about 8.30 a.m. on 26 January 1975 whilst the deceased was working at the work site of the first appellant at Jalan Timor, Petaling Jaya she was knocked down by a motor lorry No. BAN 3231 belonging to the first appellant and driven by the second

appellant. She was knocked down whilst the second appellant was reversing the lorry. As a result of the injuries caused to the deceased, i.e. shock and haemorrhage and crushed injuries to head, she died almost instantaneously, leaving a widower, the respondent, and eight children whose ages were at the time of death 20, 17, 16, 14, 11, 7, 6 and 5 years. The deceased had been insured by the first appellant under the Employees' Social Security Act 1969 under Insurance No. 32/094346.

On 10 May 1976 the respondent sued the first and second appellants claiming damages under ss. 7 and 8 of the Civil Law Act 1956 for the benefit of himself and the eight surviving children of the deceased on account of loss and damages suffered by them as a result of the deceased's death. The appellants denied liability. They claimed that they were not guilty of any negligence in the incident and in particular contended that they were not liable because the deceased being an insured person under the Employees' Social Security Act 1969 the respondent is barred under s. 31 of the Act from bringing this action.

The case came before Harun J on 29 November 1977, 2 December 1977 and 22 February 1978. A good deal of time was taken up before the learned Judge on the question whether or not s. 31 is applicable to the suit. Finally the learned Judge held that the appellants were liable and made an order in the sum of RM15,500 as general damages with interest thereon at the rate of 6% from the date of the writ and RM200 as special damages with interest thereon at the rate of 3% from the date of the death of the deceased and also cost of the suit. The appellants appealed against this decision to us and likewise the issue which was argued before us was solely on the question whether or not s. 31 of the Social Security Act is applicable to bar the respondent from suing the appellants. The learned Judge wrote no grounds of judgment, but it is obvious from his decision that he must have held that s. 31 of the Employees' Social Security Act does not apply to this issue.

At the start of the hearing of this appeal Counsel for the appellants, having been apprised of the following two Federal Court decisions, conceded the point as regards the appeal by the second appellant, but continued to argue the appeal by the first appellant. We therefore dismissed the appeal by the second appellant with costs and thus proceeded to hear appeal by the first appellant only.

There are two previous decisions of the Federal Court on s. 31 of this Act. The first decision is the case of *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 MLJ 80 in which the Court held that ss. 31 and 42 bar an insured person from suing his employer in respect of an employment injury suffered by him. In the second decision in the case of *Tan Peng Loh v. Lee Aik Fong & Anor*. [1981] CLJ (Rep) 96 the Court reiterated its earlier Judgment, and further held that although an insured person cannot sue his employer for damages in respect of employment injury, s. 31 does not prevent him from suing a third party, such as his co-employee, whose negligence has caused injury to him.

The facts in the present case are in a way similar to those in *Tan Peng Loh's* case in that the employer and the co-employee of an insured person were sued except that in the present case the insured person is dead and that the suit is instituted by her widower under ss. 7 and 8 of the Civil Law Act. There can be no doubt that had the deceased lived and sued her employer and her co-employee, *Tan Peng Loh's* case would have been a complete answer in that she would not be able to obtain judgment against her employer, the first appellant but would succeed against her co-employee, the second appellant. As the suit against the appellants was instituted by the widower of the deceased insured person, Counsel for the widower submitted to us that despite these two Federal Court decisions, the respondent is

not barred from suing for damages against both the appellants, because, he submitted, s. 31 does not apply to a widower. Whilst we agree that a widower is not a dependent within the meaning of the Act and therefore *prima facie* not subject to s. 31, and s. 42, we must, however, look at this case from the point of view of the widower's (respondent's) title to institute this civil suit.

At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough CJ in *Baker v. Bolton* [1808] 1 Camp. 493 ruled that "in a civil court the death of a human being could not be complained of as an injury." The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: "*actio personalis moritur cum persona*". The first principle which regarded death as not giving rise to any cause of action was rectified by s. 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act 1934. The provisions of these two UK statutes are now incorporated in ss. 7 and 8 of our Civil Law Act 1956.

Had it not been for ss. 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular s. 7, his case must stand and fall on the basis of these sections. We set out below s. 7 of the Act as follows:

> (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code.

It is clear from these wordings that the respondent must satisfy at least two conditions before he could succeed in maintaining the suit. The first is that he has to prove that the death of the deceased was caused by "wrongful act, neglect or default" of the appellants. In view of the decision of the learned Judge in giving judgment for the respondent further in the absence of Counsel's argument on the matter it must be taken that the first condition is fulfilled - i.e. death was caused by wrongful act, neglect or default of the appellants.

The second condition which must be fulfilled is that the respondent must show that the default by the appellants is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect of the injuries inflicted on her. Thus the test to be applied here is this: Would the deceased have been entitled to recover damages if she had not died and had sued the appellants? If so, her personal representative or any other person suing under s. 7 would succeed. In *Read v. The Great Eastern Rly. Co.* [1868] 3 LR QB 555 Blackburn J dealing with the effect of s. 1 of Lord Campbell's Act 1846 said that only in those cases where the person injured could have maintained an action would his personal representative have the right to sue; the intention of the enactment being that the death of the injured person should not free the wrong doer from liability. Thus if on the other hand as in *Haigh & Ors. v. The Royal Mail Steam Packet* [1888] 52 LJ QB NS 640 the deceased himself could not have recovered damages, her executor

likewise could not recover damages under the enactment. In that case the deceased was a passenger in a steamer, which was involved in a collision as a result of which the deceased was killed. The ticket issued to the deceased by the steamer's owners excluded them from liability for such incident. It was thus held that as the deceased himself could not have recovered because of exclusion of liability, his executor therefore likewise could not recover. In *Williams v. Mersey Docks and Harbour Board* [1905] 1 KB 804 Mathew LJ at p. 807 repeated the test by stating that there appeared to be a "general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative." In *British Electric Rly. Co. v. Gentile* [1914] AC 1034 their Lordships of the Privy Council had occasion to interpret the provisions of the Families Compensation Act of British Columbia, which is *in pari materia* with the UK Fatal Accidents Act 1846 and therefore with s. 7 of our Civil Law Act 1956. Lord Dunedin, delivering judgment for the board said:

> This, however, does not end the matter, for although the action under Lord Campbell's Act or the Families Compensation Act is not an action of indemnity for negligence, yet nevertheless it is an action which can only exist if certain conditions precedent are fulfilled. The first is that the death shall have been caused by wrongful act, neglect, or default of the defendants. That has in this case been affirmed by the verdict of the jury. The second is that the default is such 'as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof.
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> Their Lordships are of opinion that the *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, have maintained, i.e., successfully maintained, his action, then the action under the Act does not arise

Reverting to the present case, and applying the test we have enunciated above we are of the opinion that had the deceased been alive and sued the appellants in respect, of the injuries caused to her in this accident, she would have been barred from suing the first appellant because of s. 31 of the Employees' Social Security Insurance Act (see *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 MLJ 80 and *Tan Peng Loh v. Lee Aik Fong* [1981] CLJ (Rep) 96) but she would not have been barred from suing her co-employee, i.e. the second appellant. Consequently the respondent's position cannot be better or worse than that of the deceased herself. It must be the same. Whatever defence would have been available to the appellants against the deceased, if the deceased had survived and sued, would equally be available against the respondent. The respondent acting under s. 7 of the Civil Law Act could not have a greater right of action than what the deceased herself had and since s. 31 of the Employees' Social Security Insurance Act would have been applicable against deceased, if she had survived and sued, it is therefore equally applicable against the respondent.

Because of the view we have taken of this case, we do not think it is necessary to discuss the other arguments submitted to us by Mr. Sri Ram, Counsel for the respondent in order to take the case out of the operation of s. 31. We accept that the respondent is not a dependent within the meaning of the Employees' Social Security Act 1969, but we hold that s. 31 of this Act bars him from suing his deceased wife's employer by reason of s. 7(1) of the Civil Law Act 1956.

Hence the appeal by the first appellant is allowed and the appeal against the second appellant

is dismissed. As regards costs we agree with the submission of Counsel for the respondent that the costs of appeal and the costs in the Court below should be borne by the second appellant because it was not unreasonable for the respondent to sue the first appellant as another party. Moreover at the time when the suit was instituted the two decisions of the Federal Court were not yet delivered. We, therefore, make an order that the costs in the lower Court as well as before us should be borne by the second appellant, and that the deposit should be refunded to the first appellant.

Also found at [1982] CLJ 151